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No. 82-1438

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD R. WRIGHT, on behalf of himself and all others similarly situated,
Petitioner,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

NOBLE K. GREGORY
Counsel of Record
JAMES J. WALSH
KEVIN M. FONG
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telphone: (415) 983-1177
Counsel for Respondent

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

QUESTIONS PRESENTED FOR REVIEW

1. Is the ruling below—that a Title VII plaintiff relying on a "disparate impact" theory must show the existence of an employer's specific procedure which has a racially disproportionate impact—consistent with the decisions of this Court and the Courts of Appeals?[1]

2. Where petitioner's position at trial was that education "made no significant contribution" to salary levels, and where petitioner's expert witness testified to the same effect, may petitioner now rely upon an alleged correlation between education and salaries?

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[1] The parties are set forth in the title; a list of respondent's subsidiaries and affiliates is contained in Appendix A hereto.

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STATEMENT OF THE CASE

Petitioner's statement of the facts contains many assertions not supported by, or contrary to, the record. The relevant facts, most of which are summarized in the opinions of the district court and the Court of Appeals, are as follows:

Petitioner, a former employee of respondent International Business Machines Corporation ("IBM"), instituted a class action in the district alleging individual and group employment discrimination in violation of Title VII of the Civil Rights Act of

1964, as amended, 42 U.S.C. § 2000e, et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Pet.Appx., p. 8a). Petitioner alleged, among other things, that IBM unlawfully discriminated against blacks as a class in pay (Pet. Appx., p. 2a).[2]

Following the trial, the district court entered judgment for IBM (Pet.Appx., p. 9a). It found that petitioner was "unable to show any policy, practice or instance in which a black employee has been the victim of discrimination" (Pet.Appx., pp. 6a-7a).

It was petitioner's position during trial that "education made no significant contribution" to salary levels at IBM (Reporter's Transcript, p. 1076 (N.D.Cal.)), and petitioner's expert witness testified that including education as a variable in his statistical studies made "no significant change in the results" (Reporter's Transcript, p. 1076 (N.D. Cal.); see also p. 1203).

The Court of Appeals affirmed (Pet.Appx., pp. 8a-12a), holding that a disparate impact theory under Title VII would apply only when an employer has instituted a specific procedure that has a discriminatory effect (Pet.Appx., p. 12a). In rejecting petitioner's argument that IBM had a "policy" of paying higher salaries based on education, the Court of Appeals stated:

> "*At most*, [petitioner] was able to show a correlation between education and salary, not a causal link attributable to IBM's practices or policies. Because IBM instituted no specific procedures, practices or test, the plaintiff's claim is properly one of disparate treatment, rather than disparate impact" (Pet.Appx., p. 12a; emphasis added).

[2] The complaint also alleged discrimination against petitioner individually in pay, in promotion and in termination, and against blacks as a class in promotion (Pet.Appx., p. 2a). The class promotion claims were resolved prior to trial (Pet.Appx., p. 3a); petitioner's individual claims were dismissed at trial pursuant to Rule 41(b) of the Federal Rules of Civil Procedure (Pet.Appx., p. 3a). Petitioner has not attacked these determinations in his petition.

The Court of Appeals held that the district court's finding that petitioner failed to show discrimination by IBM against blacks was not clearly erroneous (Pet.Appx., p. 12a). On November 29, 1982, the Court of Appeals denied a petition for rehearing (Pet.Appx., p. 13a).

ARGUMENT

The crux of petitioner's position, before both this Court and the Court of Appeals, is the erroneous assertion that "black employees * * * have been disadvantaged in salary in direct relationship to their educational disadvantages" (Pet., p. 2). But petitioner's attorney conceded at trial that "the fact of the matter is that education made *no significant contribution*" (Reporter's Transcript., p. 1076 (N.D. Cal.); emphasis added).

Moreover, petitioner's argument to this Court is based on the erroneous assertion that the Court of Appeals misinterpreted *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424 in holding that a plaintiff relying on a "disparate impact" theory must show the existence of an employer's specific procedure which has a racially disproportionate impact. The decision below was entirely consistent with this Court's decisions in *Griggs* and subsequent cases: those cases make clear that a plaintiff must show that an employer's "facially neutral standards" result in a discriminatory pattern, that is, that an employer's "employment standards are discriminatory in effect" (*Dothard* v. *Rawlinson* (1977) 433 U.S. 321, 329).

Contrary to petitioner's erroneous assertion, the Court of Appeals did not "rejec[t] as not susceptible to disparate impact analysis a complex salary-setting mechanism" (Pet., p. 13). In any event, the Court of Appeals properly held that the district court's finding on this issue—that IBM's salary-setting procedure did not discriminate against blacks—was not clearly erroneous.

I. THE RULING BELOW—THAT A TITLE VII PLAINTIFF RELYING ON A "DISPARATE IMPACT" THEORY MUST SHOW THE EXISTENCE OF AN EMPLOYER'S SPECIFIC PROCEDURE WHICH HAS A RACIALLY DISPROPORTIONATE IMPACT—IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

In rejecting petitioner's argument that evidence showing a correlation between education and salaries constitutes a prima facie showing of "disparate impact," the Court of Appeals held "[b]ecause IBM instituted no specific procedures, practice or test [relating to education], the plaintiff's claim is properly one of disparate treatment" (Pet.Appx., p. 12a). The record demonstrates that there was no causal link between education and salary attributable to IBM's practices or policies; IBM had no policy of using education as a factor in setting salaries for existing IBM employees (Pet.Appx., p. 12a).[3]

It is settled by *Griggs* v. *Duke Power Co.*, (1971) 401 U.S. 424 and subsequent decisions of this Court that, as the court below held, the disparate impact model applies only when an employer has instituted a specific procedure with a discriminatory effect:

> "[*P*]*ractices, procedures, or tests* neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices" (*Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, 430; emphasis added).

Petitioner erroneously asserts that "the practice at issue in this case [is] of paying black Americans because of past disadvantage less than whites for discharging the same responsibilities" (Pet., p. 16). The record is to the contrary (see Def.Exhs. 315-N, 316-B, 315-E, 317-A, 315-C (N.D. Cal.)).

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[3] Petitioner's claim did not involve IBM's policies in setting starting salaries (Appellant's Reply Br. (9 Cir.), p. 6, n. 8).

Petitioner acknowledges that the testimony and studies of IBM's expert witness at trial, whom the district court credited, found no statistically significant differences between the salaries of similarly situated white and black employees (Pet., p. 6).

There is no basis for petitioner's contention (Pet., p. 15) that a prima facie showing of disparate impact was made based upon multiple regression analyses indicating that education had an "effect" on salaries (Pet., p. 15). The record does not even show the existence of a statistically significant correlation between education and salary for similarly situated white and black employees (see supra, pp. 2, 3). As the Court of Appeals pointed out, *at most* those regressions showed a correlation between education and salary, not that IBM considers education in its salary decisions (Pet.Appx., p. 12a), and nothing in the record suggests that employees with higher education tend to earn more that those without *because of any IBM practice or policy*.

Petitioner's reliance upon the holding in *Connecticut* v. *Teal* (1982) ___ U.S. ___, 102 S.Ct. 2525 that a "bottom line" defense would not preclude a Title VII plaintiff from establishing a prima facie case (Pet., pp. 10-11) misses the point: the Court of Appeals ruled only that plaintiff failed to establish a prima facie case by identifying an IBM procedure with a discriminatory impact; nothing below speaks to the *Teal* issue of whether an employer who uses a written examination with a discriminatory impact may assert a "bottom line" defense (Pet.Appx., p. 12a).

II. THE COURT OF APPEALS DID NOT RULE THAT A COMPLEX SALARY-SETTING PROCEDURE WAS IMMUNE FROM "DISPARATE IMPACT" ANALYSIS. IN ANY EVENT, THE DISTRICT COURT PROPERLY FOUND THAT RESPONDENT'S SALARY-SETTING PROCEDURE DID NOT DISCRIMINATE AGAINST BLACKS.

Petitioner erroneously asserts that the decision below conflicts with decisions of the Courts of Appeals because it "rejects as not susceptible to disparate impact analysis a complex salary-setting mechanism" (Pet., p. 13). Contrary to petitioner's assertion, the decision below made no mention of a complex salary-setting mechanism (see Pet. Appx., pp. 11a-12a). Thus, petitioner's argument that certiorari should be granted to resolve the alleged conflict between the decision below and decisions applying a disparate impact analysis to subjective, discretionary personnel procedures (Pet., pp. 12-13) is irrelevant.[4]

In any event, the district court properly found that IBM's salary-setting procedures did not have any discriminatory effect upon blacks. The district court found that petitioner was "unable to show any policy, practice or instance" of discrimination (Pet. Appx., pp. 6a-7a), and the Court of Appeals held that this finding was not clearly erroneous (Pet.Appx., p. 12a). The record simply does not show that "IBM's compensation practice * * * has a discriminatory effect" (Pet., p. 12); there are no statistically significant differences between the salaries of similarly situated white and black employees at IBM (supra, p. 4).

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[4] Moreover, IBM has a system of guidelines which determine raises by the performance rating of the employee; a comprehensive review system ensures that performance of employees is evaluated consistently and fairly (Def.Exh. 278-A; Reporter's Transcript, pp. 1388, 1398-1402 (N.D. Cal.)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

NOBLE K. GREGORY
Counsel of Record
JAMES J. WALSH
KEVIN M. FONG
Counsel for Respondent

PILLSBURY, MADISON & SUTRO
Of Counsel

APPENDIX A

List of Parent Companies, Subsidiaries and Affiliates

Respondent International Business Machines Corporation has no parent company and numerous wholly-owned subsidiaries. Minor percentages of the stock of some of its other subsidiaries are held by other shareholders. Those subsidiaries are: International Business Machines of Belgium S.A.; IBM European Office (Brussels) S.A.; Compagnie IBM France, S.A.; Cie, IBM Madagasikara, S.A.; IBM Europe, SA.; IBM Southern Area Development, S.A.; IBM Trade Development, S.A.; IBM Ireland Limited; IBM Israel Ltd.; IBM Italia, S.p.A.; Companhia IBM Portuguesa, S.A.R.L.; IBM Argentina, S.A.; IBM do Brasil-Industria, Maquinas e Servicos Ltda.; IBM de Costa Rica, S.A.; IBM de Honduras, S.A.; IBM de Mexico, S.A.; IBM de Panama, S.A.; IBM Philippines, Incorporated; IBM Thailand Company Limited; and IBM de Exportacion y Servicios, S.A.